

Crim.App.No. PD-0480-17
NO. 08-15-00013-CR
T.C. NO. 20110C03140

FILED
COURT OF CRIMINAL APPEALS
12/27/2017
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

THE STATE OF TEXAS

*

PETITIONER

VS.

*

HECTOR MACIAS

*

RESPONDENT

MOTION TO RECALL AND TO STAY MANDATE

TO THE HON. COURT OF CRIMINAL APPEALS:

COMES NOW RESPONDENT, HECTOR MACIAS AND FILES THIS
MOTION TO RECALL AND TO STAY MANDATE:

I.

In the instant case, the State sought PDR from the Court of Criminal Appeals. The State's PDR was granted, and the State prevailed. Respondent, Hector Macias sought rehearing, and his motion for rehearing was denied on December 13, 2017.

II.

According to the Texas Rules of Appellate Procedure:

Rule 18. Mandate 18.1. Issuance The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment and send it to the clerk of the court to which it is directed and to all parties to the proceeding when one of the following periods expires: (a) In the Court of Appeals. (1) Ten days after the time has expired for filing a motion to extend time to file a petition for review or a

petition for discretionary review if: (A) no timely petition for review or petition for discretionary review has been filed; (B) no timely filed motion to extend time to file a petition for review or petition for discretionary review is pending; and (C) in a criminal case, the Court of Criminal Appeals has not granted review on its own initiative. (2) **Ten days** after the time has expired for filing a motion to extend time to file a motion for rehearing of a denial, refusal, or dismissal of a petition for review, or a refusal or dismissal of a petition for discretionary review, if no timely filed motion for rehearing or motion to extend time is pending.

In the case at bar, Respondent Macias suggests that the Court of Criminal Appeals has entered its mandate before the ten days have expired. For this reason, and for the reasons below, Respondent Macias moves for the Court to withdraw its mandate and to grant a 90 day stay of the mandate.

II.

Respondent Macias suggests that the 10th day from the date of the Court's denial of Respondent's Motion for rehearing falls on today, Saturday, December 23, 2017; because it is a Saturday, and because Saturday, Sunday and the Christmas holiday are not counted, Respondent Macias suggests that he has until Tuesday, December 26, 2017, to file his motion to stay mandate; nonetheless, Respondent suggests that he timely files the instant motions on today's date, December 23, 2017, because it is the 10th day (albeit a Saturday) after the Court has denied Respondent's motion for rehearing. For these reasons, Respondent moves for the Court to withdraw its mandate as premature.

III.

Further, pursuant to Rule 18.2, TRAP, cited below, Respondent respectfully moves for the Court to stay the mandate for 90 days until such time as the Supreme Court of the United States determines whether to accept certiorari in the instant case.

Rule 18.2 states:

18.2. Stay of Mandate A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

Respondent Hector Macias avers that because the case at bar involves a serious issue of double jeopardy, which would subject Respondent to yet another trial, Respondent states in this motion that his Petition for Certiorari will include:

REASONS FOR GRANTING THE WRIT

Petitioner argues that he was placed in jeopardy, and that manifest necessity did not exist for the trial court to sua sponte dismiss the jury, retrial of the instant case is prohibited under the Double Jeopardy Clause of the 5th Amendment to the United States Constitution.

The ground for review, stated above, and the circumstances surrounding this case, that Respondent Macias would be subject to prosecution which may be jeopardy barred based upon the 5th Amendment, are substantial and that the petitioner would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment.

WHEREFORE: RESPONDENT HECTOR MACIAS prays that the Court grant the requested relief by withdrawing its mandate and granting Macias' motion to stay the mandate for 90 days.

Respectfully submitted,

/S/ M. DeKoatz

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CERTIFICATE OF DELIVERY: I hereby certify that on below date, I caused to be delivered a true and correct copy of the above instrument to Mr. Jaime Esparza, District Attorney, through the Texas electronic email system.

_____/S/ M. DeKoatz_____
 DATE: 12/23/17
 MATTHEW DEKOATZ, Attorney at Law